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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOSEPH LOPEZ et al.,

Plaintiffs and Appellants,

v.

SHARP HEALTHCARE,

Defendant and Respondent.

D074114

(Super. Ct. No. 37-2016-00027281-  
CU-PA-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

Law Offices of Marc D. Mabile, Marc D. Mabile; Law Offices of Horacio Barraza, Horacio Barraza; Terry Singleton APC and Terry Singleton for Plaintiffs and Appellants.

Lotz, Doggett & Rawers, Jeffrey S. Doggett, Lauren E. Hardisty and Brian Bloodworth for Defendant and Respondent.

Joseph Lopez, his wife Dianna Lopez, their adult daughter Danielle Lopez, and Jaime Leonen, Danielle's boyfriend, exited a vehicle parked on a dirt shoulder on the

west side of the 2900-3000 block of Health Center Drive.<sup>1</sup> They then crossed a public street where a car struck Joseph and Jaime. Joseph was severely injured, and Jaime died.

Joseph, Dianna, and Danielle as well as James Leonen, individually and as successor in interest, and Anne Calef (Jaime's parents) (Joseph, Dianna, Danielle, James Leonen, and Anne Calef collectively Plaintiffs) sued multiple defendants, including Sharp Healthcare (Sharp). Among other allegations, Plaintiffs averred that Sharp controlled the dirt shoulder where Plaintiffs parked the vehicle. As such, Plaintiffs claimed Sharp was liable for damages associated with Joseph's injuries and Jaime's death.

Sharp demurred to the operative complaint, and the superior court sustained the demurrer without leave to amend. Plaintiffs appeal the ensuing judgment, arguing the court erred in sustaining the demurrer. In the alternative, Plaintiffs maintain they can plead additional facts to state a valid claim against Sharp. We conclude Plaintiffs' contentions are without merit. Accordingly, we affirm.

## FACTUAL AND PRODECURAL BACKGROUND

### The Second Amended Complaint's Allegations

On September 25, 2015, Plaintiffs traveled in a vehicle to visit a family member's newborn baby at the Sharp Mary Birch Hospital (Hospital). Joseph parked the vehicle on the dirt shoulder of Health Center Drive, located across the street from the Hospital's driveway entrance. At that time, the dirt shoulder was wide enough for vehicles to park for free. Employees of nearby hospitals and medical centers parked their vehicles on the

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<sup>1</sup> To avoid confusion because of shared last names, we use the first names of these individuals in our opinion.

dirt shoulder for free daily. The City of San Diego (City) had authorized vehicles to park on the dirt shoulder since Health Center Drive first existed in 1956.

After exiting the vehicle, Dianna and Danielle grabbed a gift from the vehicle's trunk then walked east across Health Center Drive. Apparently, they did not use a crosswalk, but made it safely across the street.

Joseph and Jamie crossed the public road soon thereafter. They, too, did not use a crosswalk. Both Joseph and Jaime walked safely to the center of Health Center Drive. However, when they crossed over the center and continued to walk east over Health Center Drive, they were struck by a car at about 8:20 p.m. Joseph was severely injured, and Jaime died.

Plaintiffs alleged a total of six causes of action, with four aimed at the driver of the car that struck Joseph and Jaime, three alleged against the City, and four pointed at Sharp. Regarding the City, Plaintiffs alleged:

"The City of San Diego, its agents and employees, while in the course and scope of their employment, negligently and carelessly owned, possessed, planned, designed, constructed, managed, maintained, controlled, marked, signed, repaired, inspected, and supervised the roadway on Health Center Drive and the dirt shoulder located on the west side of Health Center Drive located in the City of San Diego, in that, among other things, the physical configuration of the roadway and dirt shoulder where Plaintiffs parked their vehicle on September 25, 2015, was improper and/or inadequate thereby creating a defective and dangerous condition for traffic and pedestrians crossing the street both after exiting their parked vehicles or returning to their parked vehicles pursuant to Government Code section 835, so as to proximately cause decedent, Jaime Leonen and Plaintiff, Joseph Lopez, to be struck by a motor vehicle . . . as they were walking east across Health Center Drive at approximately 8:20 p.m. on September 25, 2015. Said dangerous condition created a reasonably foreseeable risk of the type of injury and death as

herein alleged and constituted a dangerous and hazardous condition of public property[,] which was the legal cause of Plaintiff's *[sic]* injuries described above."

Plaintiffs further alleged that the City had actual or constructive notice of the dangerous condition of allowing vehicles to park on the dirt shoulder on the west side of Health Center Drive. In addition, they averred that no sidewalks or crosswalks existed to allow pedestrians to cross Health Center Drive. Moreover, Plaintiffs alleged that the dangerous conditions were exacerbated at night because there were no street lights where they crossed Health Center Drive.

Regarding Sharp, Plaintiffs alleged that Sharp "owned, operated, managed, maintained, supervised, and controlled various hospitals and health care facilities . . . located along the east side of Health Center Drive[.]" They also averred Sharp "benefited and derived a commercial benefit from the additional parking that dirt shoulder created for their employees, patients and visitors as the dirt shoulder became a de-facto parking area for [Sharp's] employees, patients and visitors." Plaintiffs further alleged that Sharp "was aware that people that parked on the dirt shoulder were exposed to an unreasonable risk of harm in having to walk across Health Center Drive to and from their vehicles based on the multiple prior auto vs. pedestrian accidents that occurred on this roadway which they were aware of." Additionally, Plaintiffs claimed that, after several vehicles received citations for parking on the dirt shoulder, Sharp contacted the City's Parking Enforcement Division and persuaded it to withdraw the citations. The City's Parking Enforcement Division complied with the request and placed the west side of the 2900 through 3000 block of Health Center Drive on its non-enforcement list. After

the instant accident, Sharp contacted the City's mayor and requested that parking on the dirt shoulder be eliminated. About 90 days after this request was made, "No Parking" signs were placed on the dirt shoulder. Plaintiffs assert that Sharp's contact with the City regarding citations and parking on the dirt strip indicated the "influence and control" Sharp possessed over the dirt shoulder.

### Sharp's Demurrer

Sharp demurred to the operative complaint, arguing that it could not be liable under any cause of action because it did not exercise control over the dirt shoulder or Health Center Drive, and it did not owe a duty of care to Plaintiffs. Plaintiffs opposed the demurrer, contending Sharp owed a general duty of reasonable care to Plaintiffs. They also maintained that Sharp exercised control over parking on the dirt shoulder. Plaintiffs represented that most people who parked on the dirt shoulder "were forced to cross mid-block" instead of traveling north or south of the dirt shoulder to crosswalks that were about "three football fields" away.

At the hearing on the demurrer, Plaintiffs' counsel made an offer of proof that "the number two man" at Sharp commented after he learned of the accident with Joseph and Jaime that " 'the police started ticketing the cars about a year ago, and we made them stop. Oh, joy. Let's hope that doesn't get out.' " Counsel also represented that he could allege additional facts to show that Sharp needed the parking spaces that existed on the dirt shoulder. Plaintiffs' counsel insisted that "Sharp officials" have the mayor's number in their cellphones and "can contact him anytime they want."

After taking the matter under submission, the superior court issued a minute order sustaining Sharp's demurrer without leave to amend. The court explained that the instant action was analogous to *Contreras v. Anderson* (1997) 59 Cal.App.4th 188 (*Contreras*). To this end, the court stated that Sharp never took any affirmative actions that physically showed to outside observers that it exerted control over the dirt shoulder. Further, the court found that Sharp did not take any actions to maintain the dirt shoulder. Finally, the court concluded that Plaintiffs did not show how they could amend the complaint to state a valid cause of action against Sharp.

Plaintiffs timely appealed.

## DISCUSSION

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "When reviewing a judgment dismissing a complaint after a successful demurrer, we assume the complaint's properly pleaded or implied factual allegations are true . . . ." (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320 (*Campbell*).)

"In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) "Reversible error is committed if the facts alleged show entitlement to relief under any possible legal theory. [Citation.]" (*Duggal v. G.E. Capital Communications Servs.* (2000) 81 Cal.App.4th 81, 86.)

"[W]hen [a demurrer] is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. [Citation.]" (*City of Dinuba v. County of Tulare, supra*, 41 Cal.4th at p. 865.) In reviewing the sustaining of a demurrer, we review the trial court's result for error, not its legal reasoning. (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 631.)

Ordinarily, "[a] defendant cannot be held liable for the defective or dangerous condition of property which it [does] not own, possess, or control." (*Isaacs v. Huntington Mem'l Hosp.* (1985) 38 Cal.3d 112, 134; see *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162 (*Alcaraz*); *Contreras, supra*, 59 Cal.App.4th at p. 197.) Here, there are no allegations that Sharp owned the dirt shoulder or Health Center Drive. Instead, Plaintiffs claim they sufficiently alleged, in the second amended complaint, that Sharp controlled the dirt shoulder on which Joseph parked his vehicle on September 25, 2015. In arguing the allegations are adequate, Plaintiffs insist the allegations show that Sharp "exercised considerable influence and control over public property owned by the City in order to keep the dirt shoulder available for parking for its employees, visitors and patients. An obvious business purpose. [sic] This created a duty on [Sharp] to avoid exposing the

people who parked on the dirt shoulder from the unreasonable risk of harm of being struck by a vehicle when crossing the street mid-block."

In the operative complaint, Plaintiffs alleged Sharp controlled the dirt shoulder based on the following: (1) Sharp "benefited and derived a commercial benefit from the additional parking that dirt shoulder created for [its] employees, patients and visitors as the dirt shoulder became a de-facto parking area for [Sharp's] employees, patients and visitors"; (2) after vehicles were cited for parking on the dirt shoulder, Sharp "interceded and contacted the Parking Enforcement Division of the City of San Diego and persuaded them to withdraw the citations"; and (3) after the instant accident, Sharp contacted the City's mayor and "requested that the parking on the dirt shoulder on the west side of Health Center drive be eliminated[]" and about 90 days later, " 'No Parking' signs were installed." Based on these allegations, Plaintiffs insist the instant action is analogous to *Alcaraz*, *supra*, 14 Cal.4th 1149. We disagree.

*Alcaraz* is a case involving a motion for summary judgment wherein our high court found a triable issue of material fact existed as to whether the defendants exercised control over the property on which the hazard was located. (*Alcaraz*, *supra*, 14 Cal.4th at p. 1153.) There, a tenant was injured when he stepped into a water meter box located in the lawn in front of the rental property of which he was a tenant. (*Id.* at p. 1152.) Evidence was introduced "establishing that defendants maintained the lawn that covered the approximately two-foot-wide portion of the strip of land owned by the city surrounding the meter box and adjoining their property and that, following plaintiff's injury, defendants constructed a fence that enclosed the entire lawn, including the portion



located on the narrow strip of land owned by the city. [Fn. omitted.] From this evidence, a reasonable trier of fact could infer that defendants exercised control over this approximately two-foot-wide portion of the strip of land owned by the city and treated the land surrounding the meter box, which bordered defendants' property, as an extension of their front lawn." (*Id.* at pp. 1161-1162.)

Here, there are no allegations of control like the evidence of the defendants' control in *Alcaraz*. Plaintiffs do not allege that Sharp made any physical changes to the dirt shoulder on Health Center Drive. The City made the alleged changes, i.e., withdrawing parking citations and putting up "No Parking" signs on the dirt shoulder. Further, it makes sense that the City would be the entity to make the alleged physical changes to the dirt shoulder because Plaintiffs alleged the City "owned, possessed, planned, designed, constructed, managed, maintained, controlled, marked, signed, repaired, inspected, and supervised the roadway on Health Center Drive and the dirt shoulder located on the west side of Health Center Drive[.]" And Plaintiffs alleged the City "allowed vehicles to park on the undeveloped dirt shoulder since 1956 when it acquired the strip of property from the State of California."

In comparison to Plaintiffs' allegations that the City owned, controlled, and maintained the subject dirt shoulder, there are no analogous allegations of control as to Sharp. At most, Plaintiffs have alleged that Sharp made certain complaints to the City about parking on the dirt shoulder and requested action. However, Sharp took no action similar to the defendants' acts in *Alcaraz*, *supra*, 14 Cal.4th 1149. Plaintiffs do not allege that Sharp maintained the dirt shoulder, repaired the dirt shoulder, withdrew the parking

citations, or placed "No Parking" signs on the dirt shoulder. Sharp's actions, as alleged by Plaintiffs, are no more than a concerned citizen petitioning the City to act. In short, those allegations do not establish Sharp had control over the dirt shoulder under *Alcaraz*, *supra*, 14 Cal.4th 1149.<sup>2</sup>

In addition, Sharp argues that it did not owe a duty to Plaintiffs based on *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077 (*Vasilenko*). We agree.

In *Vasilenko*, the California Supreme Court analyzed the factors of *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*)<sup>3</sup> to determine whether the defendant owed a duty to the plaintiff. (*Vasilenko, supra*, 3 Cal.5th at p. 1083.) The defendant in *Vasilenko* was a church that maintained an overflow parking lot across the street from its chapel. The plaintiff was directed to park there by church volunteers and was struck by a car while crossing the street on his way to a church function. The court determined that a landowner does not have a duty of care to assist invitees in crossing a public street when

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<sup>2</sup> Plaintiffs' alleged that Sharp received a commercial benefit from the City allowing vehicles to park on the dirt shoulder. However, Plaintiffs do not argue on appeal that this allegation supports their contention that Sharp controlled the dirt shoulder. Indeed, such an allegation, by itself, cannot. Our high court rejected a "commercial benefit" requirement to establish liability for injuries occurring on a property. (See *Alcaraz, supra*, 14 Cal.4th at p. 1165.) Considering what the court said about commercial benefit in *Alcaraz*, Plaintiffs have not explained here how their commercial benefit allegations establish Sharp controlled the dirt shoulder.

<sup>3</sup> The *Rowland* factors consist of: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland, supra*, 69 Cal.2d at p. 113; see *Vasilenko, supra*, 3 Cal.5th at p. 1083.)

the landowner does nothing to obscure or magnify the dangers of crossing the street. (*Vasilenko, supra*, 3 Cal.5th at pp. 1081-1082.) Regarding the closeness of the connection between the defendant's conduct and the plaintiff's injury, the court stated: "unless the landowner impaired the driver's ability to see and react to crossing pedestrians, the driver's conduct is independent of the landowner's. Similarly, unless the landowner impaired the invitee's ability to see and react to passing motorists, the invitee's decision as to when, where, and how to cross is also independent of the landowner's. Because the landowner's conduct bears only an attenuated relationship to the invitee's injury, we conclude that the closeness factor tips against finding a duty." (*Id.* at p. 1086.)

Plaintiffs attempt to distinguish *Vasilenko* from the instant action by contending the dirt shoulder here was more dangerous than the parking lot in *Vasilenko*. Yet, Plaintiffs ignore the fact that neither Joseph nor Jaime sustained their injuries while on the dirt shoulder. Instead, like the plaintiff in *Vasilenko*, they were injured crossing a public street. Moreover, Plaintiffs' argument assumes they have sufficiently pled that Sharp controlled the dirt shoulder. As we discuss above, they have not.

In addition, the facts here are less severe than the facts on which the court found the defendant did not owe a duty to the plaintiff in *Vasilenko*. (See *Vasilenko, supra*, 3 Cal.5th at pp. 1081-1082, 1086.) In *Vasilenko*, the defendant maintained the parking lot and told the plaintiff to park there. No similar allegations exist in the instant action. Plaintiffs do not claim that Sharp maintained the dirt shoulder or told Plaintiffs to park there. Moreover, Plaintiffs do not allege Sharp did anything to increase the risks inherent to crossing a public street midblock. Simply put, under *Vasilenko*, Sharp cannot be liable

under the facts alleged. (See *Vasilenko*, at p. 1086; *Contreras*, *supra*, 59 Cal.App.4th at p. 201 [no evidence that the defendants engaged in any "assertive, controlling conduct" necessary to establish liability for the plaintiff's injury that incurred on parking strip not owned by the defendants].)

Finally, Plaintiffs contend that if we determine they have not alleged a valid cause of action in the second amended complaint, we should nonetheless reverse the judgment and remand the matter to allow them to amend their complaint. To this end, they represent here that they could add the following allegations:

"At all times relevant, [Sharp] affirmatively exerted assertive control over the roadway located on the 2900 to 3000 block of Health Care Drive [(HCD)]. The dirt shoulder on HCD is part of the roadway. The California Highway Traffic Manual defines 'Shoulder' — 'as that portion of the roadway contiguous with the traveled way for accommodations of stopped vehicles, for emergency use, and for lateral support of base and surface courses.' Further, [Sharp's] assertive and controlling conduct which precluded the City from exercising total control of its own property was demonstrated when they contacted the City of San Diego Parking Enforcement Division on October 15, 2013, and demanded that approximately 60 tickets that were issued to vehicles parked on the dirt shoulder be removed and that parking be allowed. In response to [Sharp's] demand, the City immediately removed and voided those parking violation citations. This assertive control was admitted by [Sharp] when its Executive Vice President, Dan Gross, sent an email dated September 26, 2015, to another [Sharp] executive wherein he confirms that [Sharp] made the City of San Diego Parking Enforcement stop issuing tickets to vehicles parked on the west side dirt shoulder of HCD. Specifically, Dan Gross' email states: '. . . the "police started ticketing the cars about a year ago and we made them stop. . . . Oh joy. . . Let's hope that doesn't get out." '

"Additional evidence of [Sharp] affirmatively exerting assertive control over the dirt shoulder was evidenced when [Sharp's] Executive Vice President, Dan Gross, called and spoke with the Mayor of the City of San Diego and demanded that parking be

eliminated on the dirt shoulder after the instant accident. Within three months of [Sharp's] direction, the City prohibited parking and installed 'No Parking' signs."

"The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Campbell, supra*, 35 Cal.4th at p. 320.) Plaintiffs have not satisfied their burden here. The additional allegations are just reiterations of averments in the second amended complaint with some new detail (e.g., reference to a specific email, naming Sharp's executive vice president). Also, Plaintiffs' "new" allegations are little more than a semantic sleight of hand. In the second amended complaint, they allege Sharp "persuaded" the City to withdraw the parking citations and "requested" that parking on the dirt shoulder be eliminated. In the proposed new allegations, Plaintiffs now claim that Sharp "demanded" the City withdraw the parking citations and "demanded" the mayor eliminate parking on the dirt. In using the word "demand" to describe Sharp's interactions with the City, Plaintiffs claim they have pled Sharp "affirmatively exerted assertive control" over, not only the dirt shoulder, but a portion of Health Center Drive, a public road. We are not persuaded. These new allegations do not sufficiently allege control under *Alcaraz, supra*, 14 Cal.4th 1149, *Vasilenko, supra*, 3 Cal.5th 1077, or *Contreras, supra*, 59 Cal.App.4th 188. In short, Plaintiffs have not alleged and do not represent that they can allege that Sharp engaged in "assertive, controlling conduct" on the dirt shoulder and/or Health Care Drive. And whether Plaintiffs alleged Sharp requested or demanded the City act, it is clear, from Plaintiffs' own allegations, that Sharp, itself, could take no action to control or maintain the dirt shoulder or Health Center Drive. It was the City, as alleged by Plaintiffs, who owned, maintained, and

controlled Health Center Drive, including the dirt shoulder. It was the City that withdrew the citations. It was the City who placed the "No Parking" signs on the dirt shoulder. Sharp did nothing but petition the City to act. Accordingly, we are satisfied that the superior court did not abuse its discretion in sustaining the demurrer to the second amended complaint without leave to amend as to Sharp. (See *City of Dinuba v. County of Tulare, supra*, 41 Cal.4th at p. 865.)

#### DISPOSITION

The judgment is affirmed. Sharp is entitled to its costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

IRION, J.

DATO, J.